

H.W., Appellant

**DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF PRISONS, Jesup, GA, Employer**

Case Submitted on the Record

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 19, 2005 appellant, then a 42-year-old captain's secretary, filed a traumatic injury claim (Form CA-1) alleging that she sustained carpal tunnel syndrome as a result of repetitive work duties. OWCP accepted her claim for bilateral carpal tunnel syndrome and paid her wage-loss compensation beginning April 3, 2006.³ Appellant underwent right carpal tunnel release surgeries on April 3 and September 5, 2006.⁴

By decision dated June 23, 2014, OWCP reduced appellant's wage-loss compensation, effective June 29, 2014, based on its finding that she had the capacity to earn wages as an administrative assistant. It found that the February 19, 2014 report from Dr. George C. Hochreiter, an osteopath and Board-certified orthopedic surgeon, who provided a second opinion examination, established that she had the capacity to perform the physical requirements of the position.

Appellant, through counsel, on October 13, 2015, requested modification of the June 23, 2014 loss of wage-earning capacity (LWEC) determination. Counsel contended that the LWEC determination was in error and that newly submitted medical evidence from Dr. Sandra Bohnstengel, Board-certified in family medicine, was sufficient to meet appellant's burden of proof or to establish a conflict in medical opinion with Dr. Hochreiter.

By decision dated January 11, 2016, OWCP denied modification of its June 23, 2014 LWEC determination. It found that the evidence of record was insufficient to support that the original decision was in error or that appellant's condition had materially worsened.

On February 10, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

During the telephone hearing, held on October 5, 2016, counsel contended that the opinion of Dr. Bohnstengel was entitled to the same or greater weight as Dr. Hochreiter's report and that this created at a minimum a conflict in the medical evidence. He asserted that the statement of accepted facts provided to Dr. Hochreiter did not adequately set forth appellant's work duties. Counsel noted that Dr. Hochreiter also found that appellant had continued wrist pain and that she had completed a functional capacity evaluation (FCE) which found that she could not perform repetitive employment.

³ By decision dated December 20, 2007, OWCP denied appellant's claim for wage-loss compensation from October 19, 2005 to March 29, 2007.

⁴ By decision dated June 26, 2009, OWCP reduced appellant's wage-loss compensation as she refused to participate with vocational rehabilitation without good cause under 5 U.S.C. § 8113(b). However, by decision dated April 19, 2012, it vacated the June 26, 2009 decision, finding that she had participated in the early and necessary stages of vocational rehabilitation.

By decision dated November 9, 2016, an OWCP hearing representative affirmed the January 11, 2016 decision. He found that the newly submitted evidence was of diminished probative value and thus insufficient to warrant modification of the prior LWEC determination.

On November 15, 2016 appellant resubmitted the February 21, 2012 and December 9, 2015 FCEs.

In a report dated June 30, 2017, Dr. Bohnstengel noted that appellant's carpal tunnel syndrome had progressively worsened and that a December 2015 FCE revealed that she could not perform even sedentary employment. She attributed appellant's disability to her employment duties.

Appellant, on November 9, 2017, requested reconsideration. In a November 8, 2017 statement, she contended that Dr. Hochreiter did not conduct a comprehensive evaluation. Appellant further asserted that he discussed the findings in a February 21, 2012 FCE. She noted that the FCE indicated that she may have had self-limiting pain behavior, but also indicated that she had an impairment of both wrists, which OWCP accepted as valid. Appellant maintained that Dr. Hochreiter failed to provide work restrictions on repetitive movement. She noted that a December 9, 2015 FCE indicated that she was unable to perform sedentary work duties and that her physician had concurred with this assessment.

By decision dated November 16, 2017, OWCP denied appellant's request for reconsideration as she had not raised an argument or submitted evidence sufficient to warrant reopening her case for further merit review under 5 U.S.C § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁵

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶

A request for reconsideration must also be received by OWCP within one year of the date of OWCP decision for which review is sought.⁷ If OWCP chooses to grant reconsideration, it

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010).

⁷ *Id.* at § 10.607(a). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employee's Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

reopens and reviews the case on its merits.⁸ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁹

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

By decision dated November 9, 2016, OWCP denied modification of its June 23, 2014 LWEC determination. On November 9, 2017 appellant timely requested reconsideration.¹⁰

As a general rule, if a formal LWEC determination has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In that instance, the claims examiner should evaluate the request according to the customary criteria for modifying a formal LWEC.¹¹ Nonetheless, in cases where arguments submitted have previously been addressed by OWCP and in which a claimant submits no new or relevant evidence, OWCP may address the request under the provisions found in section 8128 of FECA and deny merit review.¹²

The issue is whether appellant submitted evidence or raised an argument in support of her request for reconsideration sufficient to warrant further merit review pursuant to 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law or raise a relevant legal argument not previously considered. She contended that Dr. Hochreiter failed to perform a complete examination, failed to restrict repetitive movement, and failed to review a February 21, 2012 FCE that found that some of her behavior was self-limiting. OWCP, however, previously considered counsel's contention that Dr. Hochreiter's report was of diminished probative value. As appellant's argument is cumulative in nature, it is insufficient to warrant reopening her case for further merit review.¹³ Thus, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board further finds that appellant did not submit any relevant or pertinent new evidence not previously considered. Appellant resubmitted FCE reports performed on February 21, 2012 and December 9, 2015. The submission of evidence which repeats or

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *See supra* note 7.

¹¹ *L.W.*, Docket No. 16-1202 (issued January 25, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004).

¹² *L.W., id.*; *A.P.*, Docket No. 14-0851 (issued September 2, 2014).

¹³ *See J.B.*, Docket No. 17-0934 (issued September 1, 2017).

duplicates evidence already of record does not constitute a basis for reopening a case for additional merit review.¹⁴

On June 30, 2017 Dr. Bohnstengel related that appellant's carpal tunnel syndrome was worsening with time. She noted that a December 2015 FCE demonstrated that appellant could not perform sedentary employment. Dr. Bohnstengel opined that appellant was unable to work due to her employment injury. Her report, however, is substantially similar to a June 27, 2016 report previously of record, and thus does not constitute relevant and pertinent new evidence.¹⁵ Appellant, consequently, is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(3).

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁶

On appeal appellant raises arguments relevant to the merits of her claim. The only issue before the Board, however, is whether OWCP properly denied her request for reconsideration of the merits of the claim and thus these arguments are not before the Board at this time.¹⁷

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁴ See *K.M.*, Docket No. 18-0479 (issued September 17, 2018).

¹⁵ See *V.P.*, Docket No. 18-0440 (issued August 24, 2018).

¹⁶ See *R.C.*, Docket No. 17-1314 (issued November 3, 2017) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

¹⁷ See *C.F.*, Docket No. 18-0360 (issued July 19, 2018).

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board